

No. 78-1295

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

DIEGO BOTERO and ROBERT DENNIS CANTALUPO,
PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-8) is reported at 589 F. 2d 430.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1978. A petition for rehearing was denied on January 22, 1979. The petition for a writ of certiorari was filed on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless use of electronic tracking devices ("beepers") in this case violated petitioners' Fourth Amendment rights.

STATEMENT

Following a non-jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiracy to import cocaine, importing cocaine, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 952(a), 960, 963, and 841(a)(1). Each was sentenced to five years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. B-1 to B-8).

The evidence at trial, set forth in a stipulated statement of facts, showed that on September 29, 1977, a shipment of leather handbags from Colombia arrived at the San Francisco International Airport addressed to petitioners, doing business as "South American Imports." A concededly legal Customs search revealed nine pounds of cocaine concealed in secret compartments of the handbags. Drug Enforcement Administration (DEA) agents placed two beepers inside the packages and resealed them. The devices were designed so that the tone of the signal that they emitted would change when the packages were opened (Pet. App. B-2).

On October 5, 1977, petitioner Botero was advised that his shipment had arrived and cleared Customs. DEA agents observed Botero accept the shipment and followed him to Burlingame, California, where he met two associates, and then to an apartment building in San Carlos, California (Pet. App. B-2 to B-3). The shipment was carried inside one of the apartments, and a few minutes later the signal transmitted by the beepers indicated that the packages had been opened. Shortly thereafter petitioner Cantalupo left the apartment and was arrested at a nearby grocery store. The agents returned to the apartment, knocked on the door, and arrested petitioner Botero when he came to

the door.¹ Inside, the agents saw a number of handbags strewn about, many of which had been ripped open. They secured the apartment until they obtained a warrant, at which time they searched it (Pet. App. B-3). They also searched the truck in which Botero had driven from the airport and seized shipping documents for the September 29 shipment (Appellants' Opening Br. 12-13).

An examination using black light disclosed that all four persons arrested were marked with fluorescent powder of a type that Customs agents had placed in the packages before resealing them. In addition, petitioner Cantalupo told DEA agents after his arrest that he knew that the packages contained cocaine and stated that he believed his share of the profits would be \$10,000 or more (Pet. App. B-3).

ARGUMENT

1. Petitioners assert (Pet. 4-6) that the warrantless use of the beeper "to monitor[] activities inside a residence" violated their Fourth Amendment rights and that the courts of appeals, with the exception of the current decision, are unanimous in holding that a warrant is required to use a beeper inside a residence.

Contrary to petitioners' contentions, however, there is no conflict among the courts of appeals on the issue presented by this case. The Ninth Circuit in this case and in *United States v. Dubrofsky*, 581 F. 2d 208, 210-212 (1978), has taken the position that use of beepers, including beepers inserted in contraband during a Customs search, involves only a slight intrusion and accordingly does not require a warrant,

¹The two men whom petitioner Botero had picked up in Burlingame, Guillermo Valencia-Bravo and Javier Ospina-Bernal, were also arrested inside the apartment. Both men failed to appear for trial. A fifth co-defendant, Steven Ford, was tried separately by a jury and acquitted (Appellants' Opening Br. 1).

even when contraband is traced into a residence (581 F. 2d at 211). It views the beeper as "but another surveillance aid," like binoculars or radar, for which no warrant is required (*id.* at 211-212).

The other circuits that have considered the issue have likewise approved the use of beepers to trace contraband, even into residences, but have done so on a somewhat different ground. They conclude that one can have no legitimate expectation of privacy (see *Katz v. United States*, 389 U.S. 347, 351 (1967)) in contraband, since one has no right to possess it at all. See *United States v. Pringle*, 576 F. 2d 1114, 1118-1119 (5th Cir. 1978) (insertion of beepers in heroin during Customs search and subsequent tracing of shipment from car into house and then back to car is permissible); *United States v. Emery*, 541 F. 2d 887, 889-890 (1st Cir. 1976) (insertion of beeper in cocaine during Customs search and subsequent tracing of beeper into apartment is permissible). See also *United States v. Bishop*, 530 F. 2d 1156 (5th Cir.), cert. denied, 429 U.S. 848 (1976) (beeper placed in bait money); *United States v. Perez*, 526 F. 2d 859, 863 (5th Cir.), cert. denied, 429 U.S. 846 (1976) (beeper placed in item exchanged in heroin purchase). See also *Rakas v. Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 16 n.12.²

²*United States v. Moore*, 562 F. 2d 106, 110-114 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), on which petitioners rely to demonstrate a conflict, is not to the contrary. The First Circuit there disapproved use of beepers to detect the presence in a residence of substances that were legally in the suspect's possession, but the court explicitly distinguished this use from placing beepers in contraband. It reaffirmed its earlier holding in *United States v. Emery*, *supra*, that "[t]he narcotics peddler in whose [narcotics] a beeper is planted has no privacy interest in the substance" since he "ha[s] no right to possess [it] at all." 562 F. 2d at 111.

Indeed, petitioners apparently do not contest the use of the beepers up to the point that the contraband entered the apartment,³ but only their use to signal when the package was opened (see Pet. 3). But the agents' access to this additional modicum of information did not significantly increase the intrusion into petitioner's affairs. Unlike wiretaps or similar surveillance, it did not permit the agents to determine what petitioners were saying, and it did not tell them who was present or who opened the packages. It simply let them know that for one reason or another daylight had entered the boxes. See *United States v. Dubrofsky*, *supra*, 581 F. 2d at 211-212. Therefore, even though the information was gathered from inside a residence and even though it was new information, use of the beeper to get the information was no more a search for which a warrant is required than observation of the apartment from a neighboring building would have been. Indeed, the beepers told the agents less than such observation would have.

2. In any event, it is not necessary to address the use of beepers inside the apartment in order to conclude that the district court properly admitted evidence of petitioners' arrests, as well as evidence obtained during and subsequent to the arrests. There

³The circuits are also in agreement that beepers can be used to trace movements in public areas, although some require a showing of probable cause. Such a showing could easily be met in this case. Compare *United States v. Dubrofsky*, *supra*, with *United States v. Shovea*, 580 F. 2d 1382, 1387-1388 (10th Cir. 1978), cert. denied, No. 78-780 (Feb. 21, 1979); *United States v. Moore*, *supra*; *United States v. Frazier*, 538 F. 2d 1322, 1324 (8th Cir. 1976), cert. denied, 429 U.S. 1046 (1977). The Fifth Circuit has not yet resolved whether use of beepers is a search (see *United States v. Holmes*, 537 F. 2d 227 (1976) (affirming by equally divided court sitting en banc)), but has upheld their use in specific circumstances. *United States v. Pringle*, *supra*; *United States v. Perez*, *supra*.

was ample evidence independent of the beepers' signals to support these arrests. See *Wong Sun v. United States* 371 U.S. 471, 491 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

At the time petitioner Botero and his companions drove up to the apartment and carried the cartons into it, the agents knew that the packages contained cocaine imported from Colombia and that the packages were addressed to petitioners, doing business as South American Imports. They also knew that earlier shipments to the company from Colombia, which had not been opened by Customs officials, had been picked up by either Cantalupo or Botero (Appellants' Opening Br. 8); that a number of person-to-person calls had been placed by both petitioners to one number in Bogota (*ibid.*); and that Botero had recently travelled to Colombia (*ibid.*). Finally, they knew that the apartment to which the parcels were delivered belonged to Cantalupo.

This information was more than sufficient to establish the probable cause needed to arrest Cantalupo and Botero for importing and distributing cocaine. Further, the timing of the arrests was justified independent of information received from the beeper, since Cantalupo was leaving the scene when he was arrested. And once he was arrested, the agents had to move to arrest anyone else remaining in the apartment, because such persons might have become suspicious when Cantalupo did not return, and might have hidden or destroyed evidence.

Since the arrests were supported by probable cause independent of information from the beepers, information derived from these arrests, including evidence about the appearance of the apartment at the time of the arrests, and evidence of fluorescent powder on petitioners' arms, was all properly admitted. Cf. *United States v. Moore*, *supra*, 562 F. 2d at 113-114.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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